

2013 IL App (1st) 121460-U

THIRD DIVISION  
November 20, 2013

No. 1-12-1460

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 5756
	)	
SPENCER MARTIN,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant did not include in his postconviction petition his claim that his counsel on direct appeal was ineffective, that claim cannot now be considered for the first time in this appeal; the circuit court's order summarily dismissing the petition was affirmed.

¶ 2 Spencer Martin, the defendant, appeals the summary dismissal of his *pro se* postconviction petition. On appeal, defendant contends that his petition should be liberally construed to include a claim of ineffective assistance of appellate counsel for failing to assert on direct appeal that the trial court denied him the counsel of his choice. We affirm.

¶ 3 Following a bench trial in 2008, defendant was convicted of attempted murder and attempted armed robbery. The trial court sentenced defendant to consecutive terms of 18 years and 6 years in prison, respectively, for those offenses. In a direct appeal, this court affirmed the circuit court's judgment. *People v. Martin*, 408 Ill. App. 3d 44, 52-53 (2011).

¶ 4 In January 2012, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Among other claims in the petition, defendant asserted that during pre-trial proceedings, private counsel Dennis Sherman had been retained to represent him and the trial judge "refused [Sherman] any time towards trial preparation and forced him into withdrawing from his representation." Defendant asserted that as a result, he was represented by "court appointed counsel whom [defendant] felt strongly was not in his best interest." On March 30, 2012, the circuit court dismissed defendant's petition in a written order, noting Sherman had not filed an appearance for defendant and there was no indication Sherman was forced to withdraw from representing defendant.

¶ 5 Defendant now appeals the circuit court's dismissal of his petition, asserting for the first time that his petition stated the gist of an arguably meritorious constitutional claim of the ineffectiveness of his appellate counsel. He argues his counsel on direct appeal was ineffective in failing to allege that the trial court denied him the right to counsel of his choice.

¶ 6 The Act provides a three-step process for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). At the first stage of postconviction review, the circuit court independently reviews the petition to determine whether it is "frivolous or is patently without merit" and dismisses the petition if it finds that is the case. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition may be dismissed under this standard only if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition has no arguable basis in law or fact if it is based on

an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. The summary dismissal of a postconviction petition at the first stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 7 On appeal, defendant acknowledges that he did not expressly include in his petition a claim of the ineffectiveness of his appellate counsel. He argues, however, that under *Hodges*, he is only required to allege sufficient facts to present an arguable constitutional claim and that his *pro se* filing need not include legal arguments. He thereby contends his petition should proceed to the second stage of review.

¶ 8 In response, the State emphasizes defendant's concession that he now raises a claim he did not include in his postconviction filing. The State points out that our supreme court held in *People v. Jones*, 213 Ill. 2d 498, 507-08 (2004), that claims which are not included in a postconviction petition cannot be raised for the first time on appeal. In addition, the State cites the recent application of *Jones* in *People v. Cole*, 2012 IL App (1st) 102499, ¶ 11, in which this court rejected the defendant's assertion that his postconviction petition included an implicit claim of the ineffective assistance of appellate counsel.

¶ 9 The defendant in *Cole* appealed from the summary dismissal of his *pro se* postconviction petition, which included claims of due process violations, namely that: (1) the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to fully question potential jurors about fundamental principles of law applicable to the defendant's trial, and (2) the prosecutor committed misconduct by referring in closing argument to his belief that the attempted murder victim was "a credible witness." *Cole*, 2012 IL App (1st) 102499, ¶¶ 4-6.

¶ 10 The *Cole* decision featured three separate opinions. The majority opinion noted it was "undisputed that the defendant's post-conviction petition contained no reference to appellate counsel's performance on direct appeal." *Cole*, 2012 IL App (1st) 102499, ¶ 4. In affirming the

summary dismissal of the defendant's petition, the majority interpreted *Jones* to hold that claims in a petition "may not be raised for the first time on appeal when those post-conviction issues were never ruled upon the circuit court." *Cole*, 2012 IL App (1st) 102499, ¶ 13. The court reasoned the consideration of such claims would be an improper exercise of supervisory authority not vested in the appellate court, and, moreover, the court must adhere to the Act's provision that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Cole*, 2012 IL App (1st) 102499, ¶¶ 14-15, citing 725 ILCS 5/122-3 (West 2010). The majority noted a petitioner's remedy in the situation before it was to file a successive petition containing the claim. *Cole*, 2012 IL App (1st) 102499, ¶ 15. In a special concurrence, another justice agreed with that analysis and added that even if the merits of defendant's two ineffective assistance of appellate counsel claims were to be considered, the claims would not survive under a *Strickland* analysis. *Cole*, 2012 IL App (1st) 102499, ¶¶ 29-33 (Palmer, J., specially concurring).

¶ 11 However, a third justice disagreed with the conclusion that the petition was devoid of a claim of ineffectiveness of appellate counsel simply because it did not contain the words "appellate counsel." *Cole*, 2012 IL App (1st) 102499, ¶ 42 (Gordon, J., dissenting). The dissent observed that *pro se* postconviction petitions must be liberally construed, noting that in *Hodges*, the supreme court did not expect a petitioner to provide a legal argument as to the theories of self-defense and second degree murder. *Id.* at ¶¶ 40-41 (Gordon, J., dissenting). The dissent reasoned that where a defendant at the first stage of postconviction proceedings has prepared a petition without the aid of an attorney, the defendant's stated claims of "attorney ineffectiveness" should be broadly interpreted to include the acts or omissions of appellate counsel. *Cole*, 2012 IL App (1st) 102499, ¶ 42 (Gordon, J., dissenting).

¶ 12 In the instant case, defendant recognizes the majority's decision in *Cole* but contends that *Cole* is "contrary to Supreme Court authority." Defendant points to the holding in *Hodges* that first-

stage petitioners need only offer a modest amount of argument and are not required to present or cite legal authority. Defendant reasons that the supreme court decided *Hodges* after it issued its opinion in *Jones* and that under *Hodges*, a defendant only is required to allege a sufficient factual basis for a constitutional violation, as opposed to constructing a legal argument.

¶ 13 A *pro se* postconviction petitioner is not required to allege facts supporting all elements of a constitutional claim; rather, a *pro se* petition must be viewed with a lenient eye, and "borderline cases" should be allowed to proceed. *People v. Mescall*, 403 Ill. App. 3d 956, 962 (2010). A *pro se* petition need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Hodges*, 234 Ill. 2d at 9.

¶ 14 However, even with those rules in mind, we find our resolution of this appeal is governed by *Jones*. The supreme court in *Jones* squarely addressed the issue of raising a claim on appeal that was omitted from an initial postconviction filing, stating "our appellate court is not free, as [the supreme court] is under its supervisory authority, to excuse, in the context of post-conviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her post-conviction petition." *Jones*, 213 Ill. 2d at 508. The supreme court addressed the problem of a *pro se* litigant's omission of a claim from an initial postconviction petition by advising that the litigant can seek leave of court to file a successive petition alleging the new claim. *Jones*, 213 Ill. 2d at 509; see also 725 ILCS 5/122-1(f) (West 2010).

¶ 15 *Cole* specifically involved the defendant's attempt to raise a claim of ineffectiveness of appellate counsel for the first time on appeal. *Cole*, 2012 IL App (1st) 102499, ¶ 16. We agree with the reliance of the majority in *Cole* on the analysis in *Jones* that, although this circumstance is understandable and largely inevitable, the raising of such claims at this point is not permitted under the Act:

"[T]he typical *pro se* litigant will draft an inartful pleading which does not survive scrutiny under the 'frivolity/patently without merit' standard of section 122-2.1, and it is only during the appellate process, when the discerning eyes of an attorney are reviewing the record, that the more complex errors that a nonattorney cannot glean are discovered. The appellate attorney, not wishing to be remiss in his or her duty, then adds the newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling. \*\*\* [T]he attorney is zealously guarding the client's rights and is attempting to conserve judicial resources by raising the claim expeditiously at the first available chance. These goals are laudable, but they nonetheless conflict with the nature of appellate review and the strictures of the Act." *Cole*, 2012 IL App (1st) 102499, ¶ 12, quoting *Jones*, 213 Ill. 2d at 504.

¶ 16 We agree with *Cole's* interpretation of *Jones* that "implicit" claims in a petition may not be raised for the first time on appeal when those issues were not ruled upon by the circuit court. *Cole*, 2012 IL App (1st) 102499, ¶ 13.

¶ 17 Moreover, we note a similar claim was found to be forfeited in *People v. Mars*, 2012 IL App (2d) 110695, ¶ 33. There, the defendant asserted in his postconviction petition that his defense counsel was ineffective in failing to challenge the sufficiency of his indictment. *Mars*, 2012 IL App (2d) 110695, ¶ 32. On appeal from the petition's summary dismissal, the defendant argued for the first time that his appellate counsel was ineffective for failing to raise the issue of his indictment in his direct appeal. *Mars*, 2012 IL App (2d) 110695, ¶ 31. Noting that the "[l]iberal construction [of a petition] does not mean that we distort reality," this court found the defendant forfeited the claim

by not raising it in his postconviction petition, even though he had explicitly raised other errors of appellate counsel in his *pro se* filing. *Mars*, 2012 IL App (2d) 110695, ¶¶ 32-33.

¶ 18 In support of his position, defendant offers generalized statements of law, such as the tenet stated in *People v. Simms*, 192 Ill. 2d 348 (2000), that a claim of ineffective assistance of appellate counsel is cognizable under the Act. Defendant also refers to the proposition that "waiver should not bar consideration of an issue where the alleged waiver stems from the incompetency of appellate counsel for failing to raise the issue on appeal." See *People v. Mack*, 167 Ill. 2d 525, 531-32 (1995). While those statements are accurate, they do not assist defendant's argument here. We do not conclude that defendant's claim is forfeited because it was not raised in his direct appeal. Instead, our finding of forfeiture in this case results from defendant's failure to include the instant claim in his postconviction petition. See *Jones*, 213 Ill. 2d at 508.

¶ 19 Even if we were to find defendant's claim of ineffective assistance of appellate counsel was properly raised, that contention would not succeed on its merits. Claims of ineffectiveness of trial or appellate counsel are governed by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), under which a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 20 The *Strickland* analysis is also used to test the adequacy of appellate counsel. *Simms*, 192 Ill. 2d at 362. An appellate counsel's decision not to raise an issue on appeal is prejudicial only where the issue was meritorious. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). The focus of defendant's postconviction claim on appeal is the alleged failure of his counsel on direct appeal to raise the issue of the potential denial of his sixth amendment right to counsel during proceedings in

the trial court. The sixth amendment guarantees a criminal defendant the right to assistance of counsel (U.S. Const., amend VI), which encompasses the right to effective representation as well as the right to select and be represented by one's preferred attorney. *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 21 Defendant argues his right to his counsel of choice was violated when the trial court refused to continue the case to allow Sherman, who sought to file an appearance, time to prepare for trial. Defendant asserts that he was forced to proceed to trial with the representation of a public defender, as opposed to Sherman, his desired counsel.

¶ 22 Our review of the record reveals that neither Sherman nor defendant requested a continuance in this case. Defendant had three separate cases pending before the court, including the instant case (commenced in 2006 and referred to below as the "06 case"). On August 4, 2008, the following colloquy occurred:

"MR. SHERMAN: For the record, my name is Dennis Sherman, your Honor. I wish to file my appearance for Spencer Martin. I did not know that there is one [case] that's set for trial. If the State is ready, I obviously am not going to be ready and cannot file an appearance.

THE COURT: Well, let's see. You represent him on the one that's set for trial, right?

MS. BALMER [assistant public defender]: Right. I represent him on the three – Mr. Sherman is taking two."

¶ 23 After the prosecutor indicated he was ready, Sherman indicated he would withdraw his appearance on the 06 case. After additional discussion among the attorneys and the court, a future court date was set on defendant's two other cases for which Sherman would apparently represent defendant. Defendant then addressed the court as to the 06 case:



"DEFENDANT: Is the trial today though?

THE COURT: Yeah.

DEFENDANT: All right.

THE COURT: That's what you want, right?

DEFENDANT: Yes, sir."

¶ 24 The public defender requested a bench trial, and the case proceeded to trial. Defendant acquiesced in the commencement of his trial on that date and did not seek a continuance of his case.

¶ 25 In conclusion, defendant has forfeited the issue of the ineffectiveness of his appellate counsel by failing to state the aforementioned claim in his postconviction petition. Even if the merits of defendant's claim were considered, appellate counsel would not be found to have provided deficient representation. Therefore, we affirm the circuit court's judgment summarily dismissing the petition.

¶ 26 Affirmed.